

THE HIDDEN TRUTH ABOUT ASBESTOS DISEASE

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At the center of the national debate over the state of asbestos litigation is whether individuals with so called “unimpaired claims,” – those diagnosed with asbestos disease but not yet disabled – have been injured and whether they should be permitted to recover damages in litigation. Much ink has been circulated suggesting the principal flaw underlying the current model of asbestos litigation is that excessive money is used to pay claims for people who are allegedly “not sick,” leaving no money for the people who are “truly sick.” This article is not written to suggest, in any manner, that individuals suffering asbestos-related malignancies, whether tragic victims of mesothelioma or otherwise, are any less worthy of compensation for their horrible injuries. It is written to explain the impropriety of beginning any argument with the presupposition that those with asbestos-related disease that is not yet disabling do not have a compensable injury. The shocking reality is that the truth about the injurious nature of these so called “unimpaired” asbestos-related diseases is hidden within candid documents of those most adamant about preventing such victims from obtaining compensation – documents from within the asbestos and insurance industries.

On September 25, 2002, longtime plaintiffs’ attorney Steve Kazan testified before the Senate Judiciary Panel of the United States Congress, contending that asbestos litigation has become “a national disgrace,” because “[t]he burden of paying people who are not sick has sucked billions of dollars out of the defendant companies.” But Mr. Kazan, curiously and most unfortunately siding with the interests of the asbestos industry

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and their insurers as an alleged “voice of truth” within the plaintiffs’ bar, has an interest in preventing people with non-malignant asbestos disease from obtaining their own just compensation. After years of representing plaintiffs in those same kinds of cases, he now represents asbestos victims only if they have a malignancy, or stated somewhat differently, those cases with the greatest likelihood for large profits.

But whether a plaintiff has a devastating injury like mesothelioma or a more moderate injury like asbestos pleural disease, to prevail in any tort litigation, a plaintiff must still show some injury has been sustained. No state permits a person who has not been diagnosed with an asbestos-related disease to prosecute an asbestos claim. Any implication that people filing claims today have not been diagnosed with an asbestos disease is misleading. Whether the claim is for a malignant or non-malignant asbestos-related condition, the remedy for damages sustained then ought to be some equitable compensation for the plaintiff’s losses.

Though a strict definition of injury is perhaps elusive, a generally accepted notion is that a person has suffered an injury when the person has experienced an invasion of his or her interest in personal physical security, producing a harmful effect. A. Kanner, Emerging Conceptions of Latent Personal Injuries in Toxic Tort Litigation, 18 Rutgers L.J. 343, 348 (1987) (citing Restatement (Second) of Torts, § 7 (1977)). Plaintiffs with both pleural and pulmonary asbestos disease have undoubtedly experienced an invasion of their interest in personal physical security. They have inhaled asbestos fibers that have caused physical damage to their lungs. A simple side-by-side comparison of photographs of a healthy lung and a lung with asbestos-related pleural or pulmonary disease may be

convincing enough. But if it is not, consider what the asbestos companies and their insurers themselves have said.

One insurer has acknowledged internally, “The injury to the body begins at the first inhalation of asbestos fibers. Although the eventual change in the lungs begins to develop at this time, it is not until the disease is relatively advanced that a firm diagnosis of asbestosis can be made.” Not only have the insurers generally recognized that asbestos fibers cause injury to the lung within minutes of inhalation, they acknowledge asbestos may alter or cause serious mutations in the chromosomal structures of the cells of the pleura. Affidavit of John E. Craighead, M.D., for American Motorists Ins. Co., Republic Ins. Co., and Constitution State Ins. Co., in *Stonewall Ins. Co. v. Nat’l Gypsum Co.*, United States District Court for the Southern District of New York.

According to the asbestos companies own Proposed Medical Findings of Fact filed in the California insurance litigation, asbestos fibers deposited in the lung “cause mechanical injury to cells and adjoining tissue. ... This mechanical injury occurs within minutes or hours of the deposition of asbestos fibers in the alveolar region of the lung and continues for as long as asbestos fibers remain in the lung.” Proposed Medical Findings of Fact by Armstrong World Industries, Inc., Fibreboard Corp., GAF Corp., Johns-Manville Parties and Nicolet, Inc., In re Asbestos Ins. Coverage Litig., Superior Court of Calif., City and County of San Francisco, Dept. No. 9, Jud. Council Coord. Proceeding No. 1072, filed Sept. 12, 1985, at 14-15 (“Insureds’ Proposed Medical Findings”).

The pathogenesis of asbestos disease, as described by the asbestos companies themselves, demonstrates that injury occurs perhaps decades before a patient becomes symptomatic. The deposition of asbestos fibers in the lung results in “damaging digestive

enzymes” and causes the release of “toxic substances ... which ‘eat away’ at the surrounding tissue.” Id. at 19. The asbestos companies agree that medical experts believe:

[I]njury and the onset of fibrosis occur soon after the initial deposition of fibers in the lung. ... [C]ountless asbestos fibers permanently retained in the lung during occupational exposure continue to cause injury and elicit a fibrogenic response. ... There is no real dispute within the medical community over the fact that injury and fibrosis resulting from occupational exposure to asbestos continue to progress indefinitely following the cessation of exposure.”

Id. at 21, 26, 30.

The asbestos companies and their insurers, amongst themselves, acknowledge that the reason asbestos victims do not immediately exhibit abnormal findings on simple pulmonary function tests is not because the lungs have not been injured, but because the lungs have a considerable reserve capacity all of which must be destroyed before symptoms become noticeable. In fact, when the same issue was raised with one asbestos company’s employees, the company explained:

Even if asbestos causes scarring in the lungs and the doctor diagnoses asbestosis based on history, chest x-rays, lung function tests, and listening to the lungs, the lungs have a great deal of reserve capacity. Until this reserve capacity is used up, a person could have no symptoms and be able to work normally.

Questions and Answers Concerning Asbestos, prepared by D.J. Billmaier, M.D. for Owens-Corning Fiberglas, Berlin, NJ (Final Draft Nov. 28, 1978).

Because of the reserve capacity, “an otherwise healthy individual can actually function normally with one entire lung removed. ... Similarly, an adult can lose the function of at least a third, and probably half of the individual alveolar/capillary gas exchange units constituting the lung parenchyma without experiencing any noticeable symptoms or presenting any clinical measurable signs.” Id. at 8-9. Dr. Craighead, who

has testified for both the asbestos and insurance industries, has approximated that 15 to 25 % of the lung is destroyed before asbestos disease is even evident on x-ray.

Deposition of John E. Craighead, Barto v. Armstrong World Ind., U.S.D.C. for the Dist. Of New Mexico, Case No. CIV 89-0932 JB (January 23, 1991). Put another way, asbestos may destroy as many as 150 million of the 300 million alveoli that comprise the totality of a lung before crude pulmonary function tests will detect such destruction. “Once the gas exchange capacity of an individual alveolar/capillary unit is compromised, the loss is permanent.” Insureds’ Proposed Medical Findings, at 10.

Asbestos-related pleural disease has often been singled out when discussing so-called “unimpaired claims.” But contrary to suggestions that pleural disease should not be considered an injury, medical evidence suggests that, just like parenchymal asbestosis, pleural disease is associated, independent of any radiographic evidence of parenchymal involvement, with such physical disabilities as decreased pulmonary function and an altered immune system.²

In one study, evaluating 1,211 sheet metal workers, asbestos pleural disease was independently associated with pulmonary function impairment, including lung volumes, decreased diffusing capacity for carbon monoxide and diminished lung compliance. Schwartz D.A., New Developments in Asbestos-Induced Pleural Disease, 99 Chest 191-198 (Jan. 1991). Three hundred thirty four of the 1,211 sheet metal workers were diagnosed with pleural fibrosis. Of that 334, 260 (78 %) had circumscribed pleural plaques and 74 (22 %) had diffuse pleural thickening. Considering only those with no evidence of parenchymal fibrosis, the study showed a consistent decline in the percent of

² Evidence also suggests that pleural disease correlates with an increased mortality rate and emotional distress due to fear of developing cancer or dying prematurely from an asbestos-related disease. These issues, however, though considerably important, are not discussed here.

predicted forced vital capacity (FVC). Significantly, an inverse relationship existed between the FVC decline and the degree of pleural fibrosis. The study similarly revealed corresponding reductions in FVC when comparing patients with only parenchymal fibrosis to those with both pleural and parenchymal involvement. Notably, sheet metal workers with diffuse pleural thickening and normal parenchyma had similar FVC readings as those with parenchymal fibrosis and normal pleura. The conclusion: both circumscribed plaques and diffuse pleural thickening are independently associated with pulmonary function decrement. Id.

Another study, by Dr. Ruth Lilis, supports the same conclusion. Studying a group of nearly 1,000 asbestos-exposed workers with circumscribed pleural fibrosis, Dr. Lilis found a statistically significant decrease of FVC readings that correlated with an increase of pleural fibrosis. The conclusion of that study, therefore, was that the overall extent of pleural fibrosis has a quantifiable decremental effect on FVC: the more extensive the circumscribed pleural fibrosis, the lower the FVC. Lilis, R., Asbestos Induced Pleural Fibrosis: Scientific Evidence For Significant Effects on Pulmonary Function, Unpublished Report.

Both Lilis and Schwartz have concluded that pleural disease may also indicate the presence of underlying undetected parenchymal disease.

It is well known from comparisons of [x-ray] findings with those obtained at post-mortem examinations, that pleural fibrosis is in many cases more extensive than recognized on the standard chest x-ray. The use of computerized tomography of the chest ... has shown that pleural fibrosis, as revealed on the CT scan, is often more extensive than that seen on the standard chest x-ray film. It thus is generally accepted that detection of pleural fibrosis on the standard PA chest x-ray is incomplete.

Id. In fact, as many as 10 % of individuals with anatomically defined interstitial fibrosis have normal routine chest x-rays. Schwartz, supra, 99 Chest at 195.

In addition to causing pulmonary function impairment, medical evidence suggests that individuals with asbestos-related pleural and pulmonary disease suffer from immune system suppression. Virtually all medical authorities now agree that asbestos exposure causes several types of malignancies, including lung carcinoma and peritoneal and pleural malignant mesothelioma. “While the pathogenesis of these forms of neoplasms is still unknown, impairment of the host immune system is believed to be one of the important factors. Aberration in humoral and cellular immunity has been observed in patients with asbestos-related diseases and in asymptomatic asbestos exposed individuals.” Lew, Tsang, Holland, Warner, Selikoff & Bekasi, High Frequency of Immune Dysfunctions in Asbestos Workers and in Patients with Malignant Mesothelioma, J. Clin. Immunol., Vol. 6, No. 3, 1986, p. 225.

Medical studies indicate that a significant percentage of asbestos exposed workers have an abnormally low number of natural killers cells as part of their immune system, which are believed to play a vital role in the body’s defense system against infections and tumor growth. Id. at 232. Natural killer cell dysfunction has similarly been demonstrated in patients with various forms of neoplastic diseases, and more recently, in patients with acquired immune deficiency syndrome (AIDS). Forbes, Greco, & Oldham; Human Natural Cell-Mediated Cytotoxicity. II Levels in Neoplastic Diseases, 11 Cancer Immunol. Immunother 147-153 (1981); Lew, Tsang, Soloman, Selikoff & Bekesi, Natural Killer Cells Function and Modulation by IFN and IL2 in AIDS Patients and Pre-Dromal Subjects, 14 J. Clin. Lab. Immunol. 115-121 (1984).

A study by P. Tsang, A. Fischbein, J. Roboz, I. Selikoff and J. Bekesi, considered the immune system in patients with malignant mesothelioma, and compared those results with other asbestos exposed individuals without such disease. Asbestos exposed workers with no clinical evidence of malignant disease at the time of examination exhibited a pattern of immune response to recall antigens similar to that observed in patients with malignant mesothelioma. Tsang, Fischebein, Roboz, Selikoff & Bekesi, Asbestos Induced Immune Disfunction and Neoplasia, reprinted in The Nature, Cellular and Biochemical Basis of Management of Immunodeficiencies Symposium, Bernreid, West Germany, September, 1986, at 505.

A later study of New York ironworkers investigated the effects of asbestos exposure on the T-cell component of the body's immune system. The T-cell analysis was correlated with the x-ray findings of asbestos-induced lung disease in the ironworker population. See Tsang, Chu, Fischebein, & Bekesi, Impairments in Functional Subsets of T-Suppressor (CD8) Lymphocytes, Monocytes, and Natural Killer Cells Among Asbestos Exposed Workers, 47 Clin. Immunol. and Immunopath. 323-332 (1988). The study identified a strong association between T-Cell ratio aberrations and x-ray abnormalities. After correlating the X-ray findings and the immunological data, 90% of those with decreased (abnormal) T-cell ratios showed some evidence of radiographic abnormalities. Id. at 329. Of those individuals diagnosed with pleural disease, 41% had an altered or suppressed immune system. Id. at 330. This is in sharp contrast to the general population where less than 5% are known to have any type of immune deficiency.

The predictive significance in terms of mortality for pleural disease victims with an altered immune system is currently under study. Nevertheless, it is clear that those individuals have clearly been injured and are anything but normal. Needless to say, virtually no one would feel comfortable knowing that his or her immune system was in any way akin to that of an AIDS patient.

Another indication from the insurers that asbestos-related disease is indeed an injury very early is the fact that insurers will either deny or charge increased premiums to insurer those diagnosed with any form of asbestos disease, including both parenchymal asbestos and pleural disease. Insurance underwriting is the process by which the mortality or morbidity risk of an applicant is evaluated. In the life insurance industry, applicants who present greater than average risk, because of medical conditions or other factors, are either charged an increased premium, or declined coverage altogether. When private health insurance or disability insurance is involved, additional risk might result in exclusion of that condition from coverage. Affidavit of Dr. Lawrence D. Jones, M.D., Senior Medical Consultant to First Colony Life Ins. Co., dated March 12, 1991, at 2.

An underwriter's evaluation of risk is based on scientific information gathered during training and through underwriting experience. This information is then interpreted through application of guidelines contained in underwriting manuals used to rate the applicants as a standard risk or substandard risk. Id. These manuals used by the industry do not differentiate between pleural and parenchymal asbestosis. In fact, in the manual of one major reinsurer, the definition of "asbestosis" has specifically included diffuse fibrosis, pleural plaques, and pleural thickening. Underwriting Manuel of Lincoln National Reinsurance (Edition 200, November 1985), at 2.

Applicants with pleural disease are affected from the moment they apply for insurance. Questions on the application form are geared to elicit information concerning asbestos-related conditions, and when answered candidly by the applicant with pleural disease, the questions serve as a trigger, causing the insurer to require a more detailed investigation of the applicant. But for the applicant's pleural disease, this investigation would probably never occur. Jones Affidavit at 3.

Once the applicant is identified as an individual who has been diagnosed as having asbestosis (including pleural disease), and further investigation is performed, including physical exams, x-rays, more tests, a review of physician's statements, the diagnosis may impact the applicant's insurability and result in a denial of coverage. Jones Affidavit, at 4-6; Underwriting Manual of Lincoln National Reinsurance (Edition 200, November 1985), at 3.

The answer then to the perceived problem with asbestos litigation is not to cull out from the mix of cases permitted to receive recovery cases that have been mis-termed "unimpaired," a term overused as a buzzword originally crafted to imply some decreased insignificance. Non-malignant asbestos cases, including either parenchymal asbestosis or pleural disease cases, still involve an injury for which a jury's determination of just compensation may be appropriate. Merely because one's injury does not necessarily amount to a death case does not mean the person with such injury is not entitled to appropriate compensation for the injury. To suggest otherwise perverts the very purpose for which the system was established. This is precisely why our New Jersey courts, in Sullivan v. Combustion Engineering, 248 N.J. Super. 134 (App. Div. 1991), refused to dismiss the claims of asbestos victims injured but not yet disabled.